

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Policies and Rules
Implementing the Telephone
Disclosure and Dispute
Resolution Act

CC Docket No. 93-22

REPLY COMMENTS OF PILGRIM TELEPHONE, INC.

Pilgrim Telephone, Inc. ("Pilgrim")¹, by and through its attorneys, hereby files its reply comments before the Federal Communications Commission ("Commission") in response to the Commission's order on reconsideration and further notice of proposed rule making in this proceeding.²

I. Introduction and Statement of Interest

A. Introduction

In its proposed rules the Commission took a balanced and proportionate response to a series of consumer complaints

¹ Pilgrim filed Comments on October 12, 1994, and requested leave to file late filed comments. Pilgrim hereby incorporates its Comments into this Reply by reference. Pilgrim has actively participated in earlier stages of this proceeding, filing Comments on April 20, 1994, a Reply on May 4, 1993 and a Petition on September 24, 1993.

² See Telephone Disclosure and Dispute Resolution Act of 1992, Pub. L. 102-556, October 28, 1992 ("TDDRA"), codified at 15 U.S.C. §§ 5711-14, 21-24, and 47 U.S.C. § 228; Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, Order on Reconsideration and Further Notice of Proposed Rule Making, FCC 94-200, released August 31, 1994 ("FNPRM").

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regarding a limited number of information providers' use of 800 service. The solution proposed by the Commission focused on revising pre-subscription rules for information providers selling pay-per-call services over 800 numbers. The Commission wisely eschewed a wholesale revision of its rules, and did not propose any other rule changes regarding pay-per-call services, the use of 800 numbers generally, the use of 800 numbers for network access, or the use of or access to tariffed services of common carriers.

Some commenters have sought to use this proceeding to push the Commission to make sweeping changes, many of which extend beyond the text and legislative history of TDDRA, conflict with existing requirements of common carriers, are not justified by the complaint record, and are already addressed by existing rules. The consequences of many of these proposals have not been adequately explored in this proceeding, mainly because the proposals raised extended far beyond the scope of the currently proposed rule changes. In some cases the proposals address hypothetical problems, ignore existing protections and regulations (such as tariff review), and ignore the fact that the Commission's current proposal is more than adequate to respond to existing consumer complaints. Other proposals have the effect, if not the intent, of granting significant competitive advantages and monopoly or duo-opoly grants to larger interexchange carriers or to the local exchange carrier.

AT&T, MCI, Sprint and Pilgrim, in their comments, have all pointed out the need to protect and preserve a wide variety of tariffed and other services offerings made to their customers over 800 access numbers without written pre-subscription agreements. Even the proposed rules may impair or eliminate some of these valuable services. Expanding the scope of written pre-subscription requirements to cover these services, as proposed by some, would significantly impair existing services and the development of new services of common carriers.

The Commission should recognize the need and desire of consumers and carriers to conduct business electronically. Any written requirements must be imposed on as narrow a class of services and dialing patterns as possible, to address legitimate consumer concerns without impairing the development of common carrier to pay-per-call services. The Commission should, therefore, avoid expanding the scope of its proposed rules beyond its current proposal.

B. Statement of Interest

Pilgrim is concerned that the Commission may adopt rules which adversely impact the offerings of common carriers, especially in transmission-related offerings such as voice mail, message store and forward and other services. All of these services are offered by at least one of AT&T, MCI, and Sprint, as

reflected in their tariffs and pleadings filed in this proceeding.

Like all carriers, Pilgrim has a number of information provider clients that take service from Pilgrim. Pilgrim not only strives to meet its obligations as a common carrier and comply with applicable statutes, rules and regulations, but also strives to ensure that users of its services also remain in compliance with the law. Pilgrim sometimes counsels users as to the interpretation and application of applicable laws. This final task can be difficult due to the various possible interpretations which may be applied to the rules.

II. Written Pre-subscription Requirement may Be Unnecessary

The proposed rules will certainly curtail the abuses and complaint which led to this proposal. Depending upon this interpretation, however, they may needlessly impair the development of pay-per-call services by eliminating valuable services which have not caused complaints (such as those offered by Sprint and mentioned in its comments). It appears that existing regulations coupled with Federal Trade Commission enforcement may already be adequate to control those information providers who were the cause of complaints.

At least one major provider of pre-subscribed pay-per-call services over 800 numbers had reportedly paid a fine to the FTC and has revised its service. We understand its pre-

subscription practices were not considered adequate by the FTC for its pay-per-call services offering.

If the practices which generated many complaints have already been determined by the FTC to violate existing rules, then enforcement may be a more appropriate solution than wholesale revision of the rules because it is tailored to the problem and does not interfere with information providers (such as Sprint in its information service offerings on 800 numbers) who make legitimate use of electronic pre-subscription.

The Commission can adequately protect consumers by clarifying and strengthening the requirements for pre-subscription, without requiring a written agreement.

III. Common Carriers Depend on 800 Service

A. Blanket Prohibitions Would Disrupt Service

While Pilgrim supports the clarification and tightening of pre-subscription rules for pay-per-call services, Pilgrim cautions against blanket prohibitions that do not take into account differences between common carriers and information providers. Common carriers use 800 service for network access to a variety of services, in most cases without written agreements. These services include:

- (1) Operator Service, which includes the completion of long distance calls to any telephone number, including to telephone numbers which offer what might be

considered information services (e.g. time, weather, movie information recordings, flight information recordings, dial-in press conferences commonly provided to the press corps, etc.).;

(2) Teleconference Service, including offerings by AT&T and others which permit rapid access via 800 number and PIN to teleconferencing;

(3) AT&T Language Line Service; and

(4) 1-800-CALL-INFO offered by MCI.

B. Calling Card Issuance

Common carriers depend on rapidly issued calling cards to identify and subscribe customers in a very competitive and fast moving market. Many of the services mentioned above depend upon 800 number access in conjunction with calling cards. Many times the specialized services of one carrier are unique to that carrier, and customers may want to use those particular services, even though they are not otherwise usual subscribers to the particular common carrier. In some instances, such as AT&T's teleconferencing service, not even a calling card is needed. The consumer merely dials an 800 number, requests a teleconference, and, after verification of the originating/billed number, is issued a PIN. In each of these instances, it is important for the common carrier to quickly establish a relationship with the customer.

Pilgrim is concerned that the Commission will move to prohibit the issuance of all calling cards and other billing vehicles of common carriers. Common carriers are generally doing a good job of reviewing and granting credit on calling card applications, making the proper verifications and policing fraudulent misuse of calling cards. The Commission should carefully avoid rule changes broader than necessary to address the specific problem.

C. Elimination of Tariffed Services Exemption

TDDRA prohibits certain calling patterns from being used not only on 800 numbers, but also on "any number widely understood to be toll free." If the TDDRA prohibitions are interpreted to include tariffed common carrier services, not only will they interfere with the access to and services offered by interexchange carriers, they will also affect or prohibit current offerings on numbers such as 411, 1-555-1212, 1-202-555-1212, 511 and 611. These numbers have traditionally been toll- and charge-free. A number of carriers, most notably the local exchange carriers, have been adding charges for directory assistance, and offering call completion for additional charges after accessing directory assistance. This example illustrates the danger of mixing TDDRA's requirements for pay-per-call services with tariffed common carrier services, already well-regulated by tariff requirements.

D. 800 Number Access to Information Services

Pilgrim believes that it understands the intention of the Commission's amendments to Section 64.1504 of the rules, but seeks clarification of the scope of the changes. The Commission's proposal clearly prohibits the transfer of a caller to an 800 number to an information service when there is an information charge for the call and no pre-subscription agreement.

Pilgrim does not believe, however, that the change is a blanket prohibition against common carriers connecting callers to information providers or information services, when the end user's initial access to the common carrier originated over its 800 access code. Any such interpretation would have the bizarre result of prohibiting a customer from dialing 1-800-CALL-ATT, entering a calling card number, and entering a telephone number for any location which offers information services. Such calls would include calls to time, weather, airlines, travel agents, accountants, and even lawyers.

Additionally, 800-COLLECT, 800-CALL-INFO, most calls placed over 1-800-CALL-ATT for the purpose of getting information, and other services offered by common carriers over 800 numbers would be prohibited. If the Commission intends to dismantle these services, Pilgrim submits that consumers,

legitimate carriers and information providers will be unfairly penalized for the acts of a few.

The Commission should realize that the bulk of all calls are made for the purpose of conveying information. Whether a caller is contacting a company for product information, airline or hotel reservations or any other use, each of these might be termed an information service. Pilgrim respectfully requests that the Commission explicitly recognize that the critical link in the prohibition is the charging for the information conveyed, as opposed to the transmission of the call, and that the tariffed services exception applies under this rule change.

This point is important because some commenters would have the Commission prohibit the termination of ANY tariffed service to ANY information service. Such an interpretation would include virtually every call made over a common carrier's lines.

If the proposed vote were interpreted as intended to include tariffed calls, the rule would also place common carriers such as Pilgrim, AT&T, MCI and Sprint in violation of federal requirements to provide 800 access numbers for end users to reach their operator services.³ These operator services are used to complete long distance phone calls and provide access to other tariffed service offerings. Callers to these 800 access numbers are, of course, charged for call completion to the ultimate

³ See 47 U.S.C. § 226(e)(1)(B); 47 C.F.R. §64.704(d); *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991), Order on Reconsideration 70 RR 2d 1443, 1456 (1992).

termination point. This termination point can be an information service -- which appears to be permitted so long as there is no additional charge for the information service.

In addition to eliminating the provision of many useful services, the broader interpretation of the Commission's proposed prohibition would seriously harm small interexchange carriers which necessarily depend on 800 number access for their customers to reach them -- especially customers which are not calling from areas in which the carrier provides 10XXX access. Smaller common carriers without ubiquitous Feature Group must rely on 800 access codes to permit end users to access their networks to complete long distance calls -- for a charge. In addition, smaller carriers are completely dependent on 800 number access for the provision of connections to consumers, especially when offering specialized common carrier services, or services to niche markets.⁴

IV. New Rules Should Clearly Distinguish Between Common Carriers and Information Providers Offering Services or Features Via 800 Access

Common carriers face issues different from information providers in the provision of services via 800 access. In light of these technical and legal differences, the Commission would be justified in implementing separate regulations for common

⁴ The Commission has recognized that it is too expensive and often technologically infeasible for smaller interexchange carriers to offer ubiquitous 1+ access to its customers.

carriers. Most consumer complaints, and the objections of consumer protection groups in this proceeding, are directed to a limited number of information providers.

Pilgrim is unaware of large numbers of complaints against carriers, but should complaints arise, the Commission is better able to stop carrier conduct because (1) common carriers are providing regulated carrier offerings, (2) common carriers must file tariffs with the Commission and are subject to the regulatory oversight of the Commission and (3) common carriers assume the risk of uncollectibles or denials for fraudulently placed calls and therefore have a strong incentive to implement credit granting and fraud control mechanisms to prevent such calls.

Some commenters have detailed a number of hypothetical abuses in which common carriers might engage. While such abuses are possible, existing mechanisms are already adequate to stop abuses should they occur. The Commission has the authority to investigate tariffs to ensure compliance with Commission regulations, and to investigate the practices of common carriers through the complaint mechanism. Carriers also have extensive customer service and dispute resolution procedures. The Commission, therefore, has ample means to oversee carrier provision of services via 800 access short of forcing consumers and common carriers to forego using and offering valuable service offerings altogether.

V. Definition of Pay-Per-Call Services

Southwestern requests that the term "simultaneous voice conversation services" as used in the TDDRA and the rules be interpreted to include personal conference services sometimes referred to as chat lines.⁵ Southwestern's request is a blatant attempt to achieve in this rule making what it cannot legally achieve through its own billing policies and "Image Statements"-- that is, rely on characterizations of speech to determine regulatory treatment. It is clear from an analysis of the legislative history of the TDDRA and statutory construction that the term "pay-per-call" was not intended to include tariffed teleconferencing service, regardless of content on purpose, commercial or otherwise.

The term "simultaneous voice conversation services" is part of the definition of pay-per-call services. Pay-per-call services are defined as being any one of three things, the first of which is information or entertainment which is produced or packaged by the provider of the service. This definition, had it stopped there, would have excluded two way or interactive communications with the provider of the services, whether with one person or with several people. The addition of simultaneous voice conversation services was necessary to include interactive

⁵ Southwestern styles its request as an "affirmation", when what it is requesting is actually a new interpretation under the rules. Southwestern Comments at 14 n.15.

and two way "live" communication, and to include such communications with three or more parties.

The legislative history associated with this bill referred to pay-per-call services as including "information (like stock quotes, sports data, and data bases); ... provide mass announcements (which play prerecorded messages); ... and provide "dating" services and group access bridging ("gab" lines or "party" lines)." ⁶ In the definitional section, however, the definition of information service was explicitly recognized as to not include "telephone services subject to regulation by the FCC", with the Committee stating that it was not its intention "to include services such as conference calling when such service is provided by a telephone company pursuant to a tariff, or when the rates charged for the service are regulated by the FCC or a state." ⁷

This makes it clear that the distinction between a tariffed teleconference and a pay-per-call service which uses teleconferencing for multi-point distribution turns solely on whether or not the service is tariffed, and not, as suggested by Southwestern, on the content or purpose of the teleconference. If the services charges for information, even in a live multi-point form, whether commercial or non-commercial, it is a pay-per-call service. If the service is a tariffed transmission

⁶ S. REP. No. 102-190, 102d Cong., 1st Sess. 1-2 (1991). [hereinafter cited as REP. 102-190.]

⁷ REP. 102-190, Section 4(3) at 12. In fact, these common carrier offerings must be offered pursuant to tariff.

service, it is not a pay-per-call service, regardless of the message content or purpose of the conference.

Earlier versions of the bill referenced "audiotext" services as being the equivalent to pay-per-call services, and appeared to contemplate the broader coverage of all conferencing services. The tightening of this language, and the specific exclusion of tariffed common carrier services, provides additional evidence that all teleconferences are still common carrier services and not information services.

In fact, Pilgrim doubts whether it would even be possible to interpret this any other way, or to exercise the definition differently. Any such attempt would hinge the interpretation upon the content of the call, or the proposed use by the parties to the call. Any attempt to define teleconference services based upon whether they are "business" or "personal" cannot be drawn, as no determination can be drawn upon the relationship between the callers.

VI. Suggestions of Some Parties Provide Competitive Advantages with Little Connection to the Proceeding

A. Percentage Tests Unfair

In a bid to preserve 800 number access to its pay-per-call services, Sprint proposes that a 5% of revenues test be applied to common carriers' pay-per-call revenues. While Pilgrim supports Sprint's efforts to continue to offer its service over

800 numbers, the proposal itself is self-serving and anti-competitive.

Sprint has been one of the least involved and least competitive providers of service to the information provider industry. Its 900 offering, for example, has virtually disappeared from the marketplace. Not being an effective player, Sprint has little to loose by proposing that others be barred above 5% of revenues. There is no legal basis for such a limit, however, and in fact that kind of test is contrary to Commission policy which recognizes that smaller carriers often specialist in niche markets during their early development.

B. Southwestern Bell

On pages 12 and 13 of its Comments, Southwestern proposes that the Commission's prohibitions be expanded to calls placed to any telephone number (not just 800 numbers), and prohibit the charging of even tariffed transport charges except when the carrier is the pre-subscribed carrier of the customer.

Southwestern's proposal is inherently anti-competitive due to the fact that it awards to the local exchange carrier and one other pre-subscribed long distance carrier an exclusive monopoly to a highly lucrative segment of the local and long distance market. Southwestern's specific proposal effectively eliminates the tariffed services exemption unless the customer happens to be using Southwestern's tariffed service.

Customers could use Southwestern's toll services to reach information services, but all other competing common carriers (except perhaps one other pre-subscribed long distance carrier, which may soon be Southwestern itself) would be prevented from completing such calls. Adoption of these provisions would also permit local exchange carriers to impose discriminatory, unjust, unworkable and illegal restraints on all other common carriers by restricting where and why customers may make use of common carrier services.

Southwestern and other local exchange carriers are actively engaged in promoting access to many of the very services it seeks to ban for others. Southwestern provides long distance and short haul intraLATA toll service, and is engaged in stimulation of usage of its network for access to information services. Examples of such stimulation include permitting access to a wide range of recorded information services provided by Great Western Directories in the Dallas/Fort Worth Metroplex. While local calls to these numbers are free to certain customers, many other customers must access these numbers through intraLATA toll calls and must pay a transmission charge to Southwestern. In addition, Southwestern provides "free" directory assistance service which encourages the caller to press a number to complete the call -- for a charge, thereby converting a call to a number widely understood to be free into a charge call.

While Pilgrim believes that the Southwestern proposal is flawed, if it is to be adopted, it must be applied uniformly

against all carriers, including local exchange and long distance, whether or not pre-subscribed carriers. In addition, these restrictions, if enacted by the Commission, will become barriers to the entry of new or specialized carriers. The Commission has recognized in the past that new carriers must often rely on niche markets and specialized groups of customers in order to make a toehold in the highly competitive telecommunications market. Southwestern's proposed restrictions will disrupt competition among carriers in favor of the established players and against smaller carriers.

VII. Conclusion

Pilgrim endorses the effort of the Commission, but recommends something short of a written pre-subscription be applied to pay-per-call services offered over 800 numbers. Pilgrim observes that some of the first enforcement of existing rules adopted under TDDRA have already caused many of the information providers who were generating complaints to change their practices.

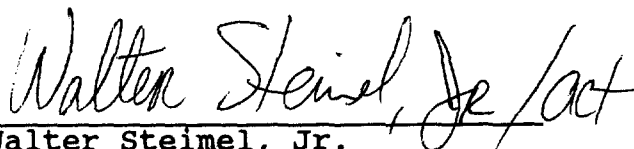
Pilgrim also seeks certainty in the interpretation and application of the rules to common carriers, specifically the preservation of the tariffed services exemption. Pilgrim requests that the Commission continue to interpret the obligations of common carriers consistently with the TDDRA and the traditional rules as applied to common carriers. Pilgrim

observes that the Commission already has significant enforcement abilities and oversight over common carriers should any misuse of tariffed service offerings occur.

Pilgrim is concerned about the scope of the proceeding as some of the commenters would choose to have it expanded. The parties have raised a number of serious issues. These issues should not be addressed in this proceeding, however, as they Commission needs to make rule changes effective on an expedited basis, and full examination of the new issues would delay resolution of the key issues in this proceeding, namely pre-subscription rules for pay-per-call services offered on 800 numbers.

Respectfully submitted,

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